87-635

Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF OKLAHOMA, *ex rel.*,
OKLAHOMA TAX COMMISSION, PETITIONER

v.

JAN GRAHAM, *et al.*, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE TENTH CIRCUIT

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PRELIMINARY MATTER

QUESTIONS PRESENTED

1. Did the Circuit Court of Appeals err in determining that an action brought against an Indian tribe automatically raises a federal question?

2. Does tribal sovereign immunity prohibit an action brought by the State to enforce the collection and remittance requirements of its tax laws on commercial activities conducted by an Indian tribe on off-reservation lands?

LIST OF PARTIES

The Appellant is the State of Oklahoma, *ex rel.*, Oklahoma Tax Commission.

The Appellees are Jan Graham and the Chickasaw Nation.

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STATE OF OKLAHOMA, *ex rel.*,
OKLAHOMA TAX COMMISSION

Petitioner,

v.

JAN GRAHAM, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner State of Oklahoma, *ex rel.*, Oklahoma Tax Commission respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 26, 1987.

OPINIONS BELOW

The order and judgment of the Court of Appeals, which is reported at 822 F.2d 951, appears in the Appendix at A-1 to A-17. The orders of the United States District Court for the Eastern District of Oklahoma, which are unreported, appear in the Appendix at A-18 to A-25.

JURISDICTION

The order and judgment of the Court of Appeals was entered on June 26, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 25 United States Code §§465 and 501 are set forth at Appendix A-26 to A-27. The relevant State taxing statutes, 68 Oklahoma Statutes §§232, 302, 302-1(a), 302-2(a), 302-3(a) and 1354 1(A), (E), (L) and (M) are set forth at Appendix A-28 to A-34.

STATEMENT OF THE CASE

1. Nature of the Controversy

The Chickasaw Nation (Tribe) conducts high stakes bingo games and sells cigarettes at a motel within the city limits of Sulphur, Oklahoma. The motel was purchased by the Chickasaw Nation from the Small Business Administration in 1972. The premises were conveyed to the United States of America in trust for the Tribe in August 1985 pursuant to the provisions of 25 U.S.C. §501 and 25 U.S.C. §465.

Oklahoma law requires vendors to collect and remit sales tax on bingo sales and cigarettes as well as on other items. 68 Okla. Stat. §1354. In addition, cigarette excise taxes are imposed on the consumer/user of cigarettes. 68 Okla. Stat. §§302, 302-1(a), 302-2(a) and 302-3(a). Payment of the cigarette excise tax is evidenced by stamps purchased by the vendor and affixed to each package of cigarettes sold. 68 Okla. Stat. §302. Failure of a vendor to collect and remit state sales tax or to affix cigarette excise tax stamps to packages of cigarettes is grounds for seeking injunctive relief. 68 Okla. Stat. §232.

The Chickasaw Nation has neither collected and remitted state sales tax from its customers nor purchased and affixed state cigarette excise tax stamps to the packages of cigarettes sold.

2. The Proceedings Below

The State brought an action in state court for injunctive relief against the Chickasaw Nation and its motel manager, Jan Graham, alleging that state taxes were not being collected and remitted in accordance with state law. The cause was removed to the United

States District Court for the Eastern District of Oklahoma by Jan Graham and the Chickasaw Nation pursuant to 28 U.S.C §1441. The District Court, in denying the State's motion to remand, relied on *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985) and found that an action to enforce state revenue statutes against activities of a federally recognized Indian tribe raised a federal question giving the court removal jurisdiction. App. A-19. The District Court then granted the motion to dismiss filed by Jan Graham and the Chickasaw Nation on the grounds of tribal sovereign immunity from unconsented suit without addressing the status of the land on which the commercial activities occurred. App. A-23. The State's motion for reconsideration was subsequently denied and the State appealed.

On appeal the Tenth Circuit affirmed the lower decisions finding "that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs," App. A-6 and, applying reservation case law to this off-reservation situation, held that tribal sovereign immunity barred this action against both Jan Graham and the Chickasaw Nation. App. A-7 to A-10.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit has for the first time introduced into the doctrine of tribal sovereign immunity the concept of portable sovereignty. This concept would allow Indian tribes to establish commercial businesses anywhere in the State in derrogation of state tax law requirements, and remain absolutely immune from the judicial process of both state and federal courts. This is contrary to the holdings of this Court. The Tenth Circuit has further established a novel doctrine that any action brought against an Indian tribe presents a federal question. Because the decision below is such a sharp divergence from established notions of tribal sovereign immunity and federal question jurisdiction, and because the case presents "an important question of federal law which has not been, but should be, settled by this Court," Rule 17.1(c), Rules of the Supreme Court, review by this Court is urgently required.

I. The Decision below is inconsistent with established prinicples of Federal Law and decisions of this court holding that off-reservation Tribal activities are subject to State Law.

The decision of the Tenth Circuit brings into focus two competing and seemingly inconsistent statements by this Court. In *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), this Court stated that "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." The Tenth Circuit relied on this statement in finding an "implicit federal question lodged in the State's complaint." App. A-4. However, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court rejected "the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe[s] for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.'" Since both *Blackfeet* and *Mescalero* involved a direct tax on the tribes involved, there must be some factor which can reconcile the two opposing statements. That factor is whether the subject activity occurs within the boundaries of a reservation.

In the area of state taxation, a state is without authority to impose its taxes on Indian reservation lands or on the Indian income from activities carried on within reservation boundaries, absent congressional consent. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). State taxation of non-Indian activities within reservation boundaries may also be preempted by operation of federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).[1] But when state law requires a tribal vendor to collect and remit taxes imposed on non-tribal consumers, the state may validly assert its authority and

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[1] *White Mountain* noted that preemption by federal law and infringement "'upon the right of reservation Indians to make their own laws and be ruled by them'" are "two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." 448 U.S. at 142.

jurisdiction over the on-reservation commercial activity. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987).

When a tribe conducts its commercial activities beyond the exterior boundaries of its reservation, however, different considerations are presented, and the state's authority and jurisdiction, both criminal and civil, including taxation, apply in the absence of an express federal statutory prohibition. *Mescalero, supra. Mescalero* established the principle that a tradition of sovereign immunity for off-reservation activities is not recognized and "off-reservation activities are within the reach of state law." *Id.* 411 U.S. at 153.[2]

In the court below, the Tenth Circuit acknowledged that the activities sought to be enjoined were from a motel owned and operated by the Tribe and that "[t]he motel was purchased by the Chickasaw Nation as part of a tribal economic development project." App. A-2. The court failed to recognize, however, the off-reservation status of the premises which calls for an entirely different analysis of state jurisdiction and tribal sovereignty than that employed when on-reservation jurisdiction is asserted by the state.[3] The lack of the territorial component in this action requires reversal of the Tenth Circuit's finding of federal court jurisdiction and sovereign immunity as a complete defense.

This case involves the attempt by the State of Oklahoma to enforce its revenue laws through injunctive relief for cigarette and bingo sales occurring on off-reservation property. This court has held that states can *require* tribal vendors to collect and remit such

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[2]This principle has been applied in state decisions relating to other states. *Hall v. University of Nevada*, 503 P.2d 1363 (Cal. 1972); *People v. Streeper*, 145 N.E.2d 625 (Ill. 1957). As stated in Streeper, "The sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference." 145 N.E.2d at 629.

[3]The State concedes the fact that title to the motel is held by the United States in trust for the Chickasaw Nation pursuant to 25 U.S.C. §501, the Oklahoma counterpart to 25 U.S.C. §465. But this fact does not convert the land into a reservation where traditional notions of tribal sovereign immunity would be applicable. *Mescalero, supra.*

taxes. *California State Board of Equalization v. Chemehuevi Indian Tribe*, 106 S.Ct. 289 (1985) (*per curiam*).[4] Inherent in the state's authority to levy a tax is the power to enforce collection of that tax through any appropriate constitutional means available. *United States v. Hester*, 137 F.2d 145 (10th Cir. 1943). One of the means deemed appropriate by the Oklahoma legislature for enforc-ing State revenue laws is injunctive relief against the vendor who fails to collect and remit the imposed taxes. 68 Okla. Stat. §232.

The Tenth Circuit failed to properly address the factual situation presented. Contrary to the characterization placed by the majority opinion below on this fact, consideration of the physical location where the activity is conducted is not merely an attempt to "interweave [ ] the merits of the action with the legal issue of dismissal." App. A-7. Rather, such consideration is, under the rulings of this court, intrinsic to the question of jurisdiction under the guidelines established in *Mescalero* and *Blackfeet*.

For the foregoing reasons, the Tenth Circuit decision conflicts with this Court's decisions upholding the validity of state taxation and state jurisdiction over Indian tribes in their off-reservation commercial activities. This Court should grant review because the lower court decision "has decided a federal question in a way in conflict with applicable decisions of this Court." Rule 17.1(c), Rules of Supreme Court.

II. This Court should grant review to determine whether, in the absence of Federal Law to the contrary, state action against off-reservation Indian activities raises a Federal Question.

The scope of State authority and jurisdiction over Indians who act beyond the boundaries of their reservation is more extensive

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[4] *Chemehuevi* arose from the sale of cigarettes on a reservation where the traditional notions of tribal sovereignty are accorded substantially greater weight than would apply in the off-reservation situation which existed in *Mescalero* and exists here. As stated in *Mescalero*, "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the state." 411 U.S. at 148, 149.

than is on-reservation authority. *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). This authority applies even when the off-reservation lands are held by the United States in trust for an Indian tribe. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). The established standard for determining state jurisdiction of off-reservation tribal activities is whether the state has been expressly prohibited by federal law from exercising such authority. When it is determined that the land is off-reservation and there is no federal prohibition, then the state's laws are in full force and effect.

Oklahoma is not a reservation state. *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943). This fact has been expressly recognized by Congress throughout the years.[5]

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[5]For example, in 1974 Congress amended the Federal Property and Administrative Services Act of 1949 [now codified in part at 40 U.S.C.§483(a)(2)]. The amendment as originally introduced authorized the Secretary of the Interior to accept federal surplus land in trust for Indian tribes or bands within whose reservation the land was located. In Committee, the Senate added the following proviso:

> "Provided, that such transfers of real property within the State of Oklahoma shall be made to the Secretary of the Interior to be held in trust for Oklahoma Indian tribes recognized by the Secretary of the Interior when such real property (1) is located within the boundaries of former reservations in Oklahoma as defined by the Secretary of Interior and when such real property was held in trust by the United States for an Indian tribe at the time of acquisition by the United States, or (2) is contiguous to real property held in trust by the United States for an Oklahoma Indian tribe and was at any time held in trust by the United States for an Indian tribe."

The Senate committee reported its reasoning to the full senate.

> "This provision is necessitated by the fact that there are no reservations in Oklahoma. Without the provision added by this amendment the authority granted by H.R. 8958 would have no applicability to Oklahoma."

The Bureau of Indian Affairs has also acknowledged that Oklahoma is not a reservation state. *Morton v. Ruiz*, 415 U.S. 199 (1974). The decision of the court below is completely void of any consideration of this fact which, if considered, will require a finding that this case cannot be based on those decisions emanating from the on-reservation status of the land. Instead the holdings of this Court in *Kake* and *Mescalero* should be followed:

Because this case involves off-reservation commercial activities of an Indian tribe, the tribe is subject to state law "absent express federal law to the contrary." *Mescalero Apache Tribe*, 411 U.S. at 148. In other words, federal preemption of state jurisdiction connot occur by mere inference but must be plainly set forth in the law. This Court has analyzed the various statutes related to state cigarette and sales taxes of Indian businesses and found no preemption which would be applicable in this case. *Washington v. Confederated Tribes of Colville*, 447 U.S. 134 (1980).

The Tenth Circuit eliminated the State's jurisdiction and authority as to off-reservation tribal commercial activities which has previously been authorized and approved by this Court. The Tenth Circuit's decision leaves the State in the position of having a right, unencumbered by federal law, to require compliance with State revenue laws with no effective remedy to enforce that right.

It is therefore essential that this Court review the decision below to determine whether State action against off-reservation tribal activites raises a federal question, in the absence of federal law to the contrary.

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5 (footnote continued from page 7)

1974 U.S. Code Cong. & Admin. News, p. 7130.

While it is true that doubtful expressions in the law are to be construed in favor of the Indians, it is also true that such a canon of construction is not a license to disregard clear expressions of congressional intent. *De Coteau v. District County Court*, 420 U.S. 425 (1975).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order and judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION,	)	
Plaintiff-Appellant,	)	
vs.	)	
	)	No. 86-1655
JAN GRAHAM AND CHICKASAW NATION, by and through OVERTON JAMES, Governor of the Chickasaw Nation,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
For the Eastern District of Oklahoma
D.C. No. 85-663-C

Robert C. Jenkins (J. Lawrence Blankenship with him on the briefs), Oklahoma City, Oklahoma, For Appellant.

Bob Rabon of Kile and Rabon, Hugo, Oklahoma, for Appellees.

Before SEYMOUR, MOORE, and TACHA, Circuit Judges.

MOORE, Circuit Judge.

The State of Oklahoma ex rel. Oklahoma Tax Commission (State or appellant) appeals the district court's denial of its motion to remand and subsequent granting of the motion to dismiss filed by defendants Jan Graham and the Chickasaw Nation (Chickasaw Nation collectively or the Tribe). In its first order, the United States District Court for the Eastern District of Oklahoma held that removal was proper because the Constitution vests the Federal Government with exclusive authority over Indian tribes which is not limited or prohibited by 28 U.S.C. § 1343, the Tax Injunction Act. The district court, in a second order, then dismissed the State's action on the basis of the Chickasaw Nation's sovereign immunity from unconsented suit. The State now urges removal was improper because the action was based on state law alone as revealed plainly on the face of its complaint. Alternatively, if removal is affirmed, the State argues that sovereign immunity cannot bar a state's legitimate power to levy and collect taxes. We disagree with both contentions and affirm the orders of the district court.

I.

The Chickasaw Nation, one of the Five Civilized Tribes early removed to Indian Territory, is a federally recognized Indian tribe which owns and operates the Chickasaw Motor Inn (the motel) in Sulfur, Oklahoma. The motel was purchased by the Chickasaw Nation as part of a tribal economic development project. The tribal legislature authorized the operation of a tobacco shop and bingo game at the motel. Jan Graham, an employee of the Chickasaw Nation, manages the motel, the tobacco shop, and the game.

The State filed its complaint in the District Court of Murray County, Oklahoma, alleging that large quantities of cigarettes not bearing state excise and tax stamps were sold at retail to the general public from the motel. The absence of these tax stamps as well as the Chickasaw Nation's failure to file reports of its sales allegedly violated Okla. Stat. tit. 68, §§ 306, 312, 316, 1354, 1361, and 1362. The State further alleged that state sales taxes had not been paid on gross receipts from the operation of the bingo game at the motel, and the required reports had not been filed. The State sought an order permanently enjoining and restraining the Chickasaw

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Nation from conducting these activities and all business at the motel until all taxes, penalties, and interest were paid in full. The state court immediately granted a temporary restraining order to enjoin the Chickasaw Nation from selling unstamped cigarettes and operating the bingo games.

Subsequently, the Chickasaw Nation removed the action to the United States District Court for the Eastern District of Oklahoma. The State moved to remand the action. Citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985), and *Moe v. Confederated Salish & Kootenia Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the district court denied the State's motion. The Chickasaw Nation then moved to dismiss the action pursuant to Fed. R. Civ. P. 12(b) for lack of subject matter jurisdiction. Granting the Tribe's motion, the district court noted that although neither this court nor the United States Supreme Court had laid a clear precedent for the determination of whether the Tribe's sovereign immunity from unconsented suits barred the present action, federal case law, particularly *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), and *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047 (9th Cir.), *rev'd in part on other grounds*, 474 U.S. 9 (1985), dictated that the doctrine of sovereign immunity bars suit against the Tribe.

We agree with the conclusion reached by the trial court, but we emphasize the issues are subject to two separate inquiries. First, we must determine whether removal jurisdiction was present. Second, if removal is proper, we must determine whether substantive jurisdiction exists.

II.

A.

The State urges us to scrutinize the face of its complaint and hold that no federal question is present to permit removal. Bisecting this argument, the State contends, first, that the action involves solely the interpretation of state tax and revenue laws and, second, that removal is prohibited by 28 U.S.C. § 1341, the Tax Injunction Act..

We are unswayed by either assertion, mindful instead that our inquiry into whether a federal court has removal jurisdiction and whether it may exercise its limited substantive jurisdiction is not perforce bounded by the face of a complaint. Indeed, when the state plaintiff couches his "necessarily federal cause of action solely in state law terms . . . the federal removal court will look beyond the letter of the complaint to the substance of the claim in order to assert jurisdiction." 14A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3722, at 243 (1985).

The substance of the State's claim embraces the central jurisdictional issue we must decide in this appeal. Indeed, when we strip the State's complaint of its statutory baggage, we are left with an action in which the State is attempting to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe.

This recognition underscores the implicit federal question lodged in the State's complaint and focuses our inquiry. *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985); *Superior Oil Co. v. United States*, 798 F.2d 1324, 1328 (10th Cir. 1986)." The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. at 2402 (citations omitted). *See also Williams v. Lee*, 358 U.S. 217, 220 (1959). The corollary of this principle is clear. "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe, Inc. v. Department of Game of Wash.*, 433 U.S. 165, 172 (1977). Moreover, it must *"affirmatively appear[]* that there has been a congressional or tribal waiver of immunity." *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d 315, 318 (10th Cir. 1982) (emphasis added); *see also Weeks Constr., Inc. v. Oglala Sioux Housing Auth.*, 797 F. 2d 668 (8th Cir. 1986). Thus, an alleged waiver or consent to suit is a necessary element of the *well-pleaded* complaint. *See also North Davis Bank v. First Nat'l Bank of Layton*, 457 F.2d 820, 822 (10th Cir. 1972) (action necessarily presented threshold question of federal law); *Madsen v. Prudential Federal Savings & Loan Ass'n*, 635 F.2d 797, 801 (10th Cir. 1980), *cert. denied*, 451 U.S. 1018 (1981) (distinguishing *North Davis Bank)*. Thus, removal jurisdiction as to our first inquiry was correctly asserted.

Furthermore, the State can direct us to no contrary precedent or priniciple to require remanding this action to the state court. The State's citations to authority are limited and distinguishable.[1] In fact, appellant is unable to provide us with any authority in which a state, absent a tribe's valid waiver or consent to suit, has succeeded in retaining state court jurisdiction in circumstances similar to our case.

Nevertheless, during oral argument, the State refocused its arguments and cited *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1 (1983), for the proposition that a federal defense will not deprive a state court of jurisdiction. Appellant contends *Franchise Tax* prohibits our going beyond the face of the complaint to fashion its cause of action to the Tribe's federal defense.

In *Franchise Tax*, the Court addressed the issue of whether a state's suit to collect state taxes against a welfare benefit trust is removable to a federal district court because of ERISA preemption of a state's power to levy on trust funds. The Supreme Court held that a suit filed by state tax authorities to enforce state levies against funds held in an ERISA employee benefit plan is neither a creature of ERISA nor a suit of which the federal courts would take jurisdiction because of a question of federal law. *Id.* at 28. The Court applied the well-pleaded complaint rule to circumscribe the presence of federal question jurisdiction in plaintiff's complaint and found that the ERISA defense did not completely preempt the state cause of action. Appellant urges the same analysis is appropriate here.

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[1]The State cites *State of Okla. ex rel. David Moss, Dist. Attorney v. Muskogee (Creek) Nation*, Nos. 86-1832, 86-1887 (N.D. Okla. filed June 4, 1986, cross appeal filed June 13, 1986). The specific issue in that appeal is whether the state may enforce its nuisance law to prohibit the operation of the tribe's bingo game. Finally, appellant cites *Wisconsin Winnebago Indian Tribe*, 603 F. Supp. 428 (W.D. Wis. 1985) (state civil forfeiture action to enforce state criminal statute is not removable). During oral argument, the State stressed that our decision in *Crow v. Wyoming Timber Products Co., 424 F.2d 93 (10th Cir. 1970)*, resolves the removal issue. Crow addresses the derivative nature of removal jurisdiction and is helpful although not entirely dispositive of this appeal.

Franchise Tax Board does not defeat federal removal jurisdiction in this case because the defendants are asserting the absence of jurisdiction and not federal preemption. Tribal sovereign immunity is jurisdictional, *Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 318 (10th Cir. 1982), and, as we shall discuss later, places a different spin upon our inquiry. At this juncture, however, we find that removal was proper because of the constitutional grant of federal jurisdiction over Indian affairs. 28 U.S.C. § 1331.

B.

This inital holding recognizes that when removal was effected automatically in this case, the federal district court instantly acquired the threshold jurisdiction to decide whether it had the power to exercise jurisdiction over the action. This "jurisdiction to determine jurisdiction" is an essential power, subject to review of any court, particularly the federal courts of limited jurisdiction. *Land v. Dollar*, 330 U.S. 731, 739 (1947); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940). For this reason, upon removal, the federal district court acquired the same threshold jurisdiction that was vested in the state court as well. This jurisdiction to determine jurisdiction is not defeated by a subsequent determination that a court does not have subject matter jurisdiction over the issues in controversy.[2]

C.

The State's second argument to defeat removal jurisdiction ignores established precedent. The Tax Injunction Act, 28 U.S.C. § 1341, does not mandate state court jurisdiction. *Moe v. Confederated Salish & Kootenia Tribes*, 425 U.S. at 463, laid this issue to rest upon analyzing the origin of § 1341 and its long-accepted applicability to the United States. *Moe* settled that "[s]ince the United States is not barred by § 1341 from seeking to enjoin the

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[2]This concept unites our threshold jurisdiction inquiry with the derivative nature of removal jurisdiction. *Minnesota v. United States*, 305 U.S. 382 (1939); *Goodrich v. Burlington Northern R.R.*, 701 F.2d 129, 130 (10th Cir. 1983).

enforcement of a state tax law, . . . the Tribe is not barred from doing so here." *Id.* at 474 (citation omitted). Section 1341 does not prohibit the Chickasaw Nation's removal of this action.

III.

Having concluded removal was proper, we turn to the State's contention that the district court erred in dismissing the suit against the Tribe and Jan Graham, individually, on the basis of tribal sovereign immunity. Support for this argument is difficult to discern because the State relies on precedent in which the issue of sovereign immunity was not raised[3] and because the State interweaves the merits of the action with the legal issue of dismissal. Nevertheless, the priniciples governing the resolution of this question are not new. On the contrary, "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164, 168 (1973) (citing *Rice v. Olson*, 324 U.S. 786, 789 (1945).

The Court has consistently recognized that "Indian tribes retain attributes of sovereignty over both their members and their territory." *California v. Cabazon Band of Mission Indians*, ___ U.S. ___, 107 S. Ct. 1083, 1087 (1987). This tribal sovereignty is historically recognized to have a unique and limited character. "It exists only at the sufferance of Congress," *United States v. Wheeler*, 435 U.S. 313, 323 (1978); serves to promote Indian self-government and economic self-sufficiency, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); and represents an accomodation between valid though competing Indian and state interests, *Rice v. Rehner*, 463 U.S. 713, 719 (1983). Although the sovereign immunity enjoyed by tribes is not absolute, we may infer

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[3]For example, the State cites *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973) (tribe brought protest of New Mexico use tax); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980) (actions were brought by the United States on behalf of the tribes); *Rice v. Rehner*, 463 U.S. 713 (1983) (federally licensed Indain trader sought declaratory judgment against state alcoholic beverage control board).

state authority only "where Congress has expressly provided that state laws shall apply." *McClanahan*, 411 U.S. at 171.

Hence, tribal sovereign immunity prohibits suit *against* Indian nations without Congressional authorization. This sovereign immunity enjoyed by a tribe is "as though the immunity which was theirs as sovereigns passed to the United States for their benefit." *Unites States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940). Thus, before *any* court can acquire jurisdiction over a tribe, it must affirmatively appear that "there has been a congressional or tribal waiver of immunity." *Ramey Constr. Co. v. Apache Tribe*, 673 F.2d at 318. "The judicial doctrine of tribal sovereign immunity has long protected Indian tribes from suit in state and federal courts." *White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984); *see also Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983).

There is no indication in the record on the motion to dismiss that an unequivocal waiver, *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, or consent to suit was offered to permit the State to litigate this action. *Chemehuevi Indian Tribe v. California State Bd. of Equalization*, 757 F.2d 1047, 1052 (9th Cir. 1985), *rev'd in part*, 474 U.S. 9 (1985). ("Like the United States, an Indian tribe can consent to suit, but 'such consent must be unequivocally indicated.'" (citations omitted)). Moreover, we are directed to no authority, absent these conditions, to authorize the suit.[4] Instead, at this stage, resolution must be guided by the established tradition of that sovereign immunity inherent in the distinct status of the Chickasaw Nation. *Santa Clara Pueblo v. Martinez*, 436 U.S. at 49; *Puyallup Tribe*, 433 U.S. at 165. Thus, the district court correctly dismissed the action as to the Chickasaw Nation.

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[4] After the district court granted the motion to dismiss, the State sought reconsideration on the ground that In Chemehuevi was later reversed. In *Chemehuevi*, the Ninth Circuit affirmed the district court's dismissal of the state's counterclaim for back taxes against the Chemehuevi tribe. The Supreme Court reversed on other grounds, and the dismissal of the counterclaim was not disturbed by the Ninth Circuit when the case was remanded. *Chemehuevi*, 800 F.2d 1446 (9th Cir. 1986).

The conclusion that the Tribe is immune from suit does not end our inquiry, however. The state contends that even if the suit against the Tribe is barred, tribal employee Jan Graham is still subject to suit under the doctrine announced in *Tenneco Oil Co. v. Sac & Fox Tribe*, 725 F.2d 572, 574 (10th Cir. 1984). We disagree.

Tribunal officials "do not have the same immunity as the Tribe itself." *Kennerly*, 721 F.2d at 1259 (citing *Martinez*, 436 U.S. at 59). But tribal immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States v. Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981). The state cannot avoid the doctrine of sovereign immunity by nominally suing a tribal officer when the suit in substance is against the sovereign. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-88 (1949). The State does not contend that Graham was not acting in an official capacity or without authorization by the Tribe.

Nevertheless, in *Tenneco Oil* we recognized that "[w]hen the complaint alleges that the named officer defendants have acted outside the amount of authority that the sovereign is capable of bestowing, an exception to the doctrine of sovereign immunity is invoked." 725 F.2d 574, 576 (McKay J., concurring). The concurrence in *Tenneco Oil* noted that "[w]ere it not for such an allegation in this case, the sovereign immunity of the tribe would extend to its officers." *Id.* We thus must examine the State's petition and complaint to determine whether employee Graham is immune from suit.

Nowhere in the State's petition is there an allegation that defendant Graham acted outside of the amount of authority that the Tribe is capable of bestowing as a matter of federal or constitutional law. It is well-established that only the Federal Government can limit the scope of tribal sovereignty. The petition only alleges that defendants failed to comply with state law. Thus, the *Tenneco Oil* exception does not apply.

Additionally, the relief sought by the State would operate directly against the Tribe and thus the suit in substance is against it

Additionally, the relief sought by the State would operate directly against the Tribe and thus the suit in substance is against it rather than Graham. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interface with the public administration,' . . . or if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted). The State seeks an accounting for "taxes, penalties, and interest" allegedly due, and seeks to enjoin the operation of the Chickasaw Nation's motel, cigarette sales, and bingo games until payment of the amounts allegedly due. The suit would in effect grant relief against the sovereign itself, "over which the court, in the absence of consent, has no jursidiction." *Larson*, 337 U.S. at 688. Thus, the suit as to Graham is also barred. *Id.*

The judgment of the district court dismissing the suit is AFFIRMED.

No. 86-1655, State of Oklahoma ex rel. Oklahoma Tax Commission v. Jan Graham and Chickasaw Nation

TACHA, Circuit Judge, dissenting.

I respectfully dissent. This is not a case about the sovereign immunity of an Indian tribe. This is a case about *who decides* the sovereign immunity of an Indian tribe. In my opinion the majority has incorrectly concluded that a claim of sovereign immunity satisfies the removal jurisdiction requirements that a federal question appear in the plaintiff's well-pleaded complaint. I would find that the federal courts do not have jurisdiction and that this case should not have been removed from state court.

I.

In *Franchise Tax Board v. Construction Laborer's Vacation Trust*, 463 U.S. 1 (1983), the Supreme Court held that a suit filed in state court can be removed to federal court only if the suit could have been filed originally in federal court. "If it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed." *Id.* at 8. Thus, we must decide whether the federal courts would have original jurisdiction over the state's tax suit against the tribe.

Federal question jurisdiction exists only if the plaintiff's well-pleaded complaint establishes that the case arises under federal law. *Id.* at 9-10; *see also Metropolitan Life Ins. Co. v. Taylor*, 107 S. Ct. 1542, 1546 (1987). It is "settled law that a case may not be removed to federal court on the basis of a federal defense". *Franchise Tax Bd.*, 463 U.S. at 14. The *Franchise Tax Board* Court recognized that:

> The [well-pleaded complaint] rule. . .may produce awkward results, especially in cases in which neither the obligation created by state law nor the defendant's factual failure to comply are in dispute,

> and both parties admit that the only question for decision is raised by a federal . . .defense. Nevertheless, it has been correctly understood to apply in such situations.

Id. at 12 (footnote omitted)

It is not disputed that the face of the state's complaint in this case raises only state tax questions. The majority, however, finds that the state's attempt "to enforce an essential element of its sovereignty, the power to tax, over an Indian tribe... underscores the implicit federal question lodged in the state's complaint." Maj. op. at 5. I disagree. This is not a case in which the plaintiff has couched a "necessarily federal cause of action solely in state law terms." 14A C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedures* § 3722 (1985). There are no questions of federal law in the state's well-pleaded complaint.

"The Constitution vests the Federal Government with exclusive authoirty over relations with Indian tribes." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764 (1985). Indeed, the Supreme Court has adopted a *per se* rule precluding state taxation of Indian tribes and tribal members. *See California v. Cabazon Band of Mission Indians*, 107 S. Ct. 1083, 1091 n.17 (1987). Congress, however, can authorize a state to tax an Indian tribe if the congressional intention to do so is unmistakably clear. *Montana*, 471 U.S. at 765. Thus, the tribe argues that because it is necessary for the state to rely upon a grant of congressional authority to tax the tribe, the state has raised a federal question in its complaint.

Gully v. First Nat'l Bank, 229 U.S. 109 (1936), instructs otherwise. In *Gully*, the state of Mississippi filed suit in state court to collect state taxes from a national bank. The lower courts granted the bank's petition to remove the action to federal court because "the power to lay a tax upon the shares of national banks has its origin and measure in the provisions of a federal statute, and that by necessary implication a plaintiff counts upon the statute in suing for the tax." *Id.* at 112 (citation omitted). The Supreme Court held that removal was improper. Justice Cardozo wrote:

> Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the federal statute consenting, subject to restrictions, that such assessments may be made. It must also be consistent with the Constitution of the United States. If there were no federal law permitting the taxation of shares in national banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. That there *is* a federal law permitting such taxation does not change the basis of the suit, which is still the statute of the state, though the federal law is evidence to prove the statute valid.

Id. at 115 (emphasis original) (citations omitted).

Gully establishes that although a state must rely upon federal authorization to tax a particular institution, a suit to collect such taxes does not necessarily raise a federal question in the well-pleaded complaint. The majority attempts to distinguish that state tax action in this case from *Gully* by arguing that a waiver of tribal immunity is part of a well-pleaded complaint. Maj. op. at 5-6. The case relied upon by the majority, *Ramey Construction Co., Inc. v. Apache Tribe of Mescalero*, 673 F.2d 315 (10th Cir. 1982), involved an action brought against an Indian tribe in *federal* court[1].

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[1] *Weeks Construction, Inc. v. Oglala Sioux Housing Authority*, 797 F.2d 668 (8th Cir. 1986), another case cited by the majority, actually undermines the position that the presence of an Indian tribe as a defendant creates a federal question. In *Weeks*, a tribal housing authority was sued in federal court. The Eighth Circuit held there was no federal question jurisdiction:

There was no question of removal jurisdiction in *Ramey*. Instead, the only question was the sovereign immunity of the tribe. It is true that the tribe is immune from suit in any court unless it has waived its immunity. Such a waiver must be express and clear; it cannot be implied. *See, e.g., Jicarilla Apache Tribe v. Hodel*, No. 85-1712, slip op. at 6 (10th Cir. June 18, 1987). It is doubtful that " a tribe can waive its immunity to suit in a state or federal court without congressional authority." F. Cohen, *Handbook of Federal Indian Law* 325 (1982 ed.) But *Gully* makes clear that the need for federal authority to sue a party does not raise a federal question for the purposes of a well-pleaded complaint.

Ramey also acknowledged that "[t]he Indian tribes' sovereign immunity is co-extensive with that of the United States." 673 F.2d at 319-20. The determination of federal question removal jurisdiction thus should be the same in cases involving Indian tribes and in cases involving the United States. While federal officials are allowed to remove all suits brought against them to federal court, the basis of removal in those instances is a separate statute rather then a pervasive federal question. 28 U.S.C. § 1442 allows for the

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[1] (continued from A-13)

> [T]he fact that the Housing Authority is created by and operates on behalf of an Indian tribe is not alone sufficient to find the existence of a federal question. *See Martinez v. Southern Ute Tribe*, 249 F.2d 915, 917 (10th Cir. 1957), *cert. denied*, 356 U.S. 960, 78 S.Ct. 998, 2 L.Ed.2d 1067 (1958) (federal question jurisdiction does not exist merely because an Indian is a party or because the suit involves Indian property or a party or because the suit involves Indian property or contracts). Rather, the rights which Weeks seeks to enforce are based on its construction contract with the Housing Authority, interpretation of which is governed by local, not federal, law... Because Weeks' breach of contract claim does not require interpretation of the validity, construction or effect of federal law, no subject matter jurisdiction over the Housing Authority based on a federal question exists here.

Weeks, 797 F.2d at 672 (footnote omitted). Similarly, the state of Oklahoma's state tax claim does not require a determination of federal law.

removal of actions brought in state court against federal officials acting in their official capacity. The right to remove a case from state court in that instance is absolute; removal takes place even if the action could not have been brought originally in federal court. *Willingham v. Morgan*, 395 U.S. 402, 406 (1969). That Congress found it necessary to enact a special removal statute authorizing federal court jurisdiction in all cases involving federal officials acting in their official capacities implies that the *status* of a federal official is not in itself sufficient to create federal jurisdiction. *See also* 12 U.S.C. § 1819 (the Federal Deposit Insurance Corp. can remove suits brought against it in state court except in specified situations where the FDIC is the receiver of a state bank). There is no such statute conferring federal jurisdiction in all cases in which an Indian tribe is a party.

Suits against foreign sovereigns are treated similarly to suits against federal officials. In *Verlinden B. V.v. Central Bank of Nigeria*, 461 U.S. 480 (1983), a Dutch corporation sued a Nigerian state bank in federal court for breach of contract. The bank moved to dismiss, arguing that the court lacked jurisdiction because of the state bank's sovereign status. The Court held that the Foreign Sovereign Immunities Act, 28 U.S.C. 6 1330, expressly provided for suits against foreign sovereigns in federal court. *Id.* at 489-91. The Court also observed:

> Prior to passage of the Foreign Sovereign Immunities Act, which Congress clearly intended to govern all actions against foreign sovereigns, state courts on occasion had exercised jurisidction over suits between foreign plaintiffs and foreign sovereigns. . . Congress did not prohibit such actions when it enacted the Foreign Sovereign Immunities Act, but sought to ensure that any action that might be brought against a foreign sovereign in state court could also be brought in or removed to federal court.

Id. at 491 n. 16 (citations omitted). Congress has not enacted an equivalent provision that would allow the removal of actions brought against an Indian tribe in state court.

II.

Tribal sovereign immunity is jurisdictional. *Ramey*, 673 F.2d at 318; *see also* Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058, 1058 (1982) ("The judicial doctrine of tribal sovereign immunity traditionally has protected Indian tribes from suit in state and federal courts.") (footnotes omitted). The question here is *which court* decides the question of sovereign immunity. *Either* the state court or the federal court must have jurisdiction to decide whether sovereign immunity applies in this case. *See, e.g., Land v. Dollar*, 330 U.S. 731, 739 (1947) (a court has jurisdiction to determine if its has jurisdiction). As the majority properly recognizes, the federal district court did not acquire the threshold jurisdiction to determine the sovereign immunity of the Chickasaw Nation until the court found that removal from state court was proper. Maj. op. at 4, 8. For the reasons I have described, I conclude that removal was improper in this case. Therefore, I would not reach the question of the sovereign immunity of the tribe.

The implication of the majority's position is that federal court removal jurisdiction exists whenever "the defendants are asserting the absence of jurisdiction." Maj. op. at 7. A challenge to state court jurisdiction cannot be sufficient to invoke removal jurisdiction. A federal court obtains removal jurisdiction only when it would have original jurisdiction. Federal law may well determine the result in a state court case, but showing that a federal question very likely will be dispositive of a case falls short of a showing that the plaintiff's original cause of action arises under federal law.

III.

This court must afford "proper respect for the ability of state courts to resolve federal questions presented in state court litigation." *Pennzoil Co. v. Texaco, Inc.* 107 S.Ct. 1519, 1527 (1987). The state court is constitutionally obligated to follow the commands of federal law regarding Indian tribal sovereignty. Should the state court fail to do so, the Supreme Court can review that decision on appeal. *See Franchise Tax Bd.*, 463 U.S. at 12 n.12.

Because the state of Oklahoma's complaint in this case does not raise a federal question, there would be no original jurisdiction in the federal courts, and thus there is no removal jurisdiction. I would hold that this action was improperly removed to federal court and that it should now be remanded to state court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,	)	
Plaintiff,	)	
vs.	)	No. 85-663-C
JAN GRAHAM, and CHICKASAW NATION,	)	
Defendant.	)	

ORDER

Now before the Court for its consideration is the motion of the plaintiff, Oklahoma Tax Commission, to remand the above styled and numbered case which was removed by defendants from the District Court of Murray County, Oklahoma, on October 22, 1985.

Defendants removed the action asserting federal question jurisdiction under 28 U.S.C. § 1331. In its motion to remand plaintiff asserts, first, that the Court lacks subject matter jurisdiction since on the face of the petition only state statutory violations are raised; and, second, that removal is prohibited under 28 U.S.C. § 1341, the Tax Injunction Act.

In *Montana v. Blackfeet Tribe of Indians*, 105 S.Ct. 2399 (1985) the court stated:

> The constitution vests the Federal Government with exclusive authority over relations with Indian tribes. (citations omitted). As a corollary of this authority, and in recognition of the sovereignty retained by Indian Tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory (citations omitted). *Blackfeet Tribe*, 105 S.Ct. at 2402.

It is apparent from reading the petition that the State of Oklahoma is attempting to enforce its revenue statutes against certain activities of a federally recognized Indian Tribe, the Chickasaw Nation. This Court clearly has subject matter jurisdiction over the controversy raised by the pleadings.

In *Moe v. Salish & Kootenai Tribe*, 425 U.S. 463 (1976), the court clearly stated 28 U.S.C. § 1341 does not bar federal courts from assuming original jurisdiction over civil actions involving Indian Tribes and a State seeking enforcement of its tax and revenue laws.

WHEREFORE, premises considered, it is the Order of the Court that the motion of the plaintiff, State of Oklahoma, ex rel. the Oklahoma Tax Commission, to remand to state court is denied.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA ex rel., OKLAHOMA TAX COMMISSION,	)	
Plaintiff,	)	
vs.	)	No. 85-663-C
JAN GRAHAM, and CHICKASAW NATION,	)	
Defendants.	)	

ORDER

Now before the Court for its consideration is the motion of the defendants, Jan Graham and Chickasaw Nation, to dismiss the action for the reason that the defendants are immune from unconsented litigation.

The defendant Chickasaw Nation owns the Chickasaw Motor Inn in Sulfur, Oklahoma. The motel is situated on trust lands, the title being vested in the United States in trust for the Tribe. The Chickasaw Nation has a tobacco shop and conducts a small bingo game at the motel. The motel is managed by a tribal employee, the defendant Jan Graham. The Oklahoma Tax Commission brought this action against the Tribe and defendant Graham. The Tax Commission seeks to collect the tax on the revenues derived from

operation of the motel, the sale of tobacco, and the bingo games; or enjoin the Tribe from continued operation of these activities.

In their motion to dismiss, defendants assert that an Indian tribe such as the Chickasaw Nation enjoys sovereign immunity from unconsented suit and this immunity extends to its officials and agents acting within the scope of tribal affairs. The Tribe cites *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), in stating "the sovereign immunity of Indian Tribes is similar to the sovereign immunity of the United States neither can be sued without the consent of Congress." *supra* at 58.

In response, the plaintiff asserts that tribal sovereignty is limited in scope to matters wholly within tribal powers, and has no application in an action to enforce state tax laws. Plaintiff concedes that the Tribe is immune from suit regarding any activity involving internal tribal self-government. However, the plaintiff contends that the immunity doctrine has no application to tribal conduct involving matters outside the Tribe's sovereign powers, e.g., the tribe's relationship or obligation to the state. Plaintiff thereafter cites authority on the merits of its lawsuit. At this stage of the litigation the Court is not reviewing the merits as to whether the State of Oklahoma may enforce its revenue laws against the Chickasaw Nation; but rather, the Court's scope of review under defendants' motion to dismiss is whether the parties are properly before the Court or whether the action is barred by the doctrine of tribal sovereign immunity. Therefore, plaintiff's recitation of authority on the merits of its action shall not be presently considered.

The Court is mindful that the Tenth Circuit and the United States Supreme Court has not laid clear precedent for this Court to follow in determination of this issue. Both parties have quoted selected portions of case law from various jurisdictions in an effort to promote their respective positions.

In *State of Oklahoma v. Senaca-Cayuga Tribe*, 711 P.2d 77 (Okla. 1985), our state supreme court has clearly taken the position that tribal sovereign immunity does not act as a bar to state's suits against Indian tribes. The court applied a balancing test and weighed

the issue in favor of state action. Albeit, the Oklahoma Supreme Court's analysis is interesting, this Court under federal jurisdiction must view the issue independently and apply the rules of law espoused by the United States Supreme Court or the Tenth Circuit. In the absence of clear controlling precedent, a review of other federal circuit court's decisions on the issue is persuasive authority.

In *White v. Pueblo of San Juan*, 728 F.2d 1307 (10th Cir. 1984), the court held that the doctrine of tribal sovereign immunity precludes federal court jurisdiction over a claim for damages under the Indian Civil Rights Act by a non-Indian against an Indian Tribe. The Tenth Circuit applied *United States v. United Fidelity & Guaranty Co.*, 309 U.S. 506 (1940), as the "long-standing rule that absent congressional authorization Indian tribes are exempt from suit under the doctrine of sovereign immunity." *White v. Pueblo, supra* at 1311.

In *Tenneco Oil v. Sac & Fox*, 725 F.2d 572 (10th Cir. 1984), the court acknowledged tribal immunity from unconsented suit, but held that tribal officials were not immune when the validity of a tribal ordinance as it applies to non-Indians (in this instance an oil company) is in question. The court held it had jurisdiction to determine whether the tribal ordinances which had the effect of cancelling oil company's oil and gas leases were valid under federal law and applicable treaties. In the case currently before the Court, the issue raised is not whether a tribal ordinance is impermissibly being applied against and effecting non-Indians; but rather, the issue is whether a state statute can properly be applied against the Tribe when suit is initiated by the state against the Tribe. This precise issue was reviewed by the Ninth Circuit in *Chemehuevi Indian Tribe v. California Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), wherein an Indian tribe brought suit challenging the validity of California's cigarette tax as applied to tobacco sold by the Tribe on the reservation to non-Indian purchasers. The Board filed a counterclaim against the Tribe for the amount of taxes allegedly owed. The Ninth Circuit disallowed the counterclaim under the doctrine of tribal sovereign immunity. The court opined:

> Because of its status as a sovereign entity, an Indian tribe is generally immune from unconsented suits. 'The common law immunity of [Indian tribes] is coextensive with that of the United States ...' This immunity is rooted in the unique relationship between the United States government and the Indian tribes, whose sovereignty substantially predates the constitution. 757 F.2d at 1051 (citations omitted).

The court concluded that "like the United States, an Indian tribe can consent to suit, but such consent must be unequivocally indicated." *Supra* at 1053.

From analysis of federal case law, this Court concludes that under the present rulings of the courts and the dictum contained in Supreme Court decision, in particular *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), defendants' motion to dismiss premised on the doctrine of tribal sovereign immunity must be and hereby is sustained.

IT IS SO ORDERED this 27th day of February, 1986.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., OKLAHOMA TAX COMMISSION,	)	
Plaintiff,	)	
vs.	)	No. 85-663-C
JAN GRAHAM, and CHICKASAW NATION,	)	
Defendant.	)	

ORDER

Now before the Court for its consideration is the motion of plaintiff for new trial or, in the alternative, motion to alter or amend judgment.

The Court has reviewed the Supreme Court's opinion in *California St. Bd. of Equalization v. Chemehuevi Indian Tribe,* 106 S.Ct. 289 (1985). The Court was aware of the opinion when the February 27, 1986, Order was entered, but through inadvertence, did not include its citation in the case history of the Ninth Circuit opinion which the Supreme Court reversed in part. Nowhere in the Supreme Court's opinion is the doctrine of tribal sovereign immunity, upon which this Court's order was based, explicitly modified. The bulk of the opinion interprets a California state statute in a particular context not before this Court. This area of the law

remains highly unsettled. Barring a more explicit statement by the Tenth Circuit Court of Appeals or the United States Supreme Court, this Court is not persuaded that it should modify its prior ruling.

Accordingly, it is the Order of the Court that the motion of plaintiff for new trial, or in the alternative, motion to alter or amend judgment should be and hereby is denied in all respects.

IT IS SO ORDERED this 27th day of March, 1986.

APPENDIX E

25 U.S.C. § 465

The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

APPENDIX F

25 U.S.C. § 501

The Secretary of the Interior is hereby authorized , in his discretion, to acquire by purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations, including trust or otherwise restricted lands now in Indian ownership: *Provided*, That such lands shall be agricultural and grazing lands of good character and quality in proportion to the respective needs of the particular Indian or Indians for whom such purchases are made. Title to all lands so acquired shall be taken in the name of the United States, in trust for the tribe, band, group, or individual Indian for whose benefit such land is so acquired, and while the title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax, not in excess of the rate applied to production from lands in private ownership, upon all oil and gas produced from said lands, which said tax the Secretary of the Interior is hereby authorized and directed to cause to be paid.

APPENDIX G

Title 68 Oklahoma Statutes § 232

When any reports required under any state tax law have not been filed or may be insufficient to furnish all the information required by the Tax Commission, or when the taxes imposed by any state tax law have not been paid, the Tax Commission may institute, in the name of the State of Oklahoma upon relation of the Tax Commission, any necessary action or proceedings to enjoin such person, firm, or corporation from continuing operations until such reports have been filed or taxes paid as required, and in all proper cases, including but not limited to cases in which the evidence establishes that a taxpayer has repeatedly failed to collect and remit sales or withholding taxes, injunction shall be issued without a bond being required from the state. After an action to enjoin the operation of any person, firm or corporation has been instituted by the Tax Commission a payout agreement under which the delinquent taxpayer is to make periodic payments toward the satisfaction of the tax debt may only be entered into upon the specific request or motion of the Tax Commission. Upon a proper showing in any such action that the claim of the state for taxes is in danger of being lost or rendered uncollectible by reason of the mismanagement, dissipation or concealment of the property by the taxpayer and a request is made for the appointment of a receiver to manage the property of the taxpayer, a receiver shall be appointed.

APPENDIX H

Title 68 Oklahoma Statutes § 302

There is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes within the State of Oklahoma a tax at the rate of four (4) mills per cigarette. No part of the cigarette tax receipts derived from said increase in the cigarette tax rate shall be used in determining the amount of cigarette tax collections to be paid into the State of Oklahoma Building Bonds of 1961 Sinking Fund pursuant to the provisions of Sections 57.31 through 57.43 of Title 62 of the Oklahoma Statutes.

The tax hereby levied shall be paid only once on any cigarettes sold, used, received, possessed, or consumed in this state. Such tax shall be evidenced by stamps which shall be furnished by and purchased from the Tax Commission or by an impression of such tax by the use of a metering device when authorized by the Tax Commission as provided for in this article, and said stamps or impression shall be securely affixed to one end of each package in which cigarettes are contained or from which consumed.

The impact of the tax levied by the provisions of this article is hereby declared to be on the vendee, user, consumer, or possessor of cigarettes in this state, and, when said tax is paid by any other person, such payment shall be considered as an advance payment and shall thereafter be added to the price of the cigarettes and recovered from the ultimate consumer or user. In making a sale of cigarettes in this state, a wholesaler or jobber may separately state and show upon the invoice covering such sale the amount of tax paid on the cigarettes sold. The tax shall be evidenced by appropriate stamps attached to each package of cigarettes sold. Every retailer who makes sales of cigarettes within this state to persons for use or consumption shall separately show the amount of tax paid as evidenced by appropriate stamps on each package of cigarettes sold, and the tax shall be collected by the retailer from the user or consumer. The provisions of this section shall in no way

affect the method of collection of such tax on cigarettes as now provided for by existing law. As to cigarettes packed in quantities of less than ten, for distribution as samples, payment of the tax may be made to the Tax Commission in a lump sum without affixing stamps on such packages.

APPENDIX I

Title 68 Oklahoma Statutes § 302-1(a)

In addition to the tax levied in Section 302 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax levied in this section shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX J

Title 68 Oklahoma Statutes § 302-2(a)

In addition to the tax levied in Sections 302 and 302-1 of this title, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of this title, within the State of Oklahoma a tax at the rate of two and one-half (2 1/2) mills per cigarette. Such tax shall be evidenced by tax stamps as now provided for; however, as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax herein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on each such package.

APPENDIX K

Title 68 Oklahoma Statutes § 302-3(a)

In addition to the tax levied in Sections 302, 302-1 and 302-2 of Title 68 of the Oklahoma Statutes, except as otherwise provided in this section, there is hereby levied upon the sale, use, gift, possession, or consumption of cigarettes, as defined in Sections 301 through 325 of Title 68 of the Oklahoma Statutes, within the State of Oklahoma a tax at a rate reflecting the amount of the reduction of the federal cigarette tax levied pursuant to the provisions of subsection (b) of Section 5701 of the Internal Revenue Code,[1] scheduled to be effective October 1, 1985. However, if the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by the amount of the reduction of said tax which was effective October 1, 1985, the provisions of this section shall cease to be effective. If the federal cigarette tax is increased subsequent to said reduction but prior to January 1, 1986, and said federal cigarette tax is increased by an amount less than the amount of the reduction of said tax which was effective October 1, 1985, the tax levied pursuant to the provisions of this section shall be at a rate reflecting the difference between the amount of the reduction of federal cigarette tax which was effective October 1, 1985, and the amount of the increase of said tax. Such tax shall be evidenced by tax stamps as now provided for by law for other cigarette taxes, except that as to cigarette packages of less than ten cigarettes for free distribution as samples, the tax therein levied shall be computed and paid as provided for other cigarette taxes without affixing stamps on such package.

APPENDIX L

Title 68 Oklahoma Statutes § 1354

1. There is hereby levied upon all sales, not otherwise exempted in the Oklahoma Sales Tax Code[1] an excise tax of three and one-fourth percent (3 1/4%) of the gross receipts or gross proceeds of each sale of the following:

(A) Tangible personal property;

* * * * * *

(E) Printing or printed matter of all types, kinds, or character and any service of printing or over-printing, including the copying of information by mimeograph, multigraph, or by otherwise duplicating written or printed matter in any manner, or the production of microfiche containing information on magnetic tapes furnished by customers;

* * * * * *

(L) Tickets for admission to or voluntary contributions made to places of amusement, sports, entertainment, exhibition, display, or other recreational events or activities, including free or complimentary admissions which have a value equivalent to the charge would have otherwise been made;

(M) Charges made for the privilege of entering or engaging in any kind of activity, such as tennis, racquetball, or handball, when spectators are charged no admission fee;